

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA G. MORALES

Claimant

VS.

WAL-MART

Respondent

AND

INS. CO. OF THE STATE OF PENNSYLVANIA

Insurance Carrier

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Docket No. 1,046,556

ORDER ON REMAND

On March 8, 2013, the Kansas Court of Appeals affirmed in part, reversed in part and remanded with directions, the Appeals Board's January 12, 2012, Order with instructions for the Board to apply a social security retirement offset to the award, pursuant to K.S.A. 2009 Supp. 44-501(h). The remainder of the Board's Order was affirmed by the Court. The Board heard oral argument on March 11, 2014.

APPEARANCES

Conn Felix Sanchez, of Kansas City, Kansas, appeared for the claimant. Michael R. Kauphusman, of Overland Park, Kansas, appeared for respondent and its insurance carrier. Due to a conflict, Board Member Gary R. Terrill, has recused himself from this appeal. Accordingly, Wade A. Dorothy, of Overland Park, Kansas, has been appointed as Board Member Pro Tem in this case.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the September 8, 2011, Award of the Special Administrative Law Judge, with additional stipulations contained in the Board's Order of January 12, 2012.

ISSUES

The Special Administrative Law Judge (SALJ) found claimant suffered an accidental injury on June 2, 2009, arising out of and in the course of her employment with respondent. Claimant continued to work for respondent until her termination, one year later. The SALJ found that it is more likely than not that claimant's injuries resulted in her disability. The SALJ then found claimant to be physically able to work and therefore, not permanently and totally disabled. Claimant was awarded a 7.5 percent whole person permanent partial functional impairment, followed by an 88 percent permanent partial general (work) disability. Respondent was found to be entitled to an offset of claimant's social security retirement benefits at the rate of \$69.00 per week, in the total amount of \$23,050.83.

Claimant appealed to the Board arguing she is permanently and totally disabled based on the opinion of Dr. Murati and therefore, the Board should modify the Award accordingly. Claimant also argued she is not subject to the provisions of the social security offset under K.S.A. 44-501(h), because she began receiving social security retirement benefits prior to the work-related accident.

Respondent argued the Board should affirm the credit for the social security retirement benefits, but limit claimant's award to a 5 percent permanent partial impairment of function to the body as a whole, with no additional award for a work disability.

The Board modified the Award of the SALJ removing the offset for claimant's social security benefit. Additionally, claimant's task loss was modified to 87 percent per the opinion of Dr. Murati, resulting in a work disability award of 93.5 percent. In all other regards, the award of the SALJ was affirmed in so far as it did not contradict the findings and conclusions contained in the Board's Order.

Respondent appealed the Board's Order to the Kansas Court of Appeals, arguing it is entitled to an offset of claimant's social security retirement benefits pursuant to K.S.A. 44-501(h), and that claimant is not entitled to work disability benefits as her termination was not related to her injury.

The Court of Appeals agreed with respondent that an offset should be applied to claimant's award as there is no evidence in the record to show claimant was retired and working at Wal-mart to supplement her income at the time of the injury. Therefore, the Court remanded the matter back to the Board to apply an offset to claimant's award to account for the social security retirement benefits she is receiving.

On remand, claimant contends the offset should only apply to a 54 week period while claimant was working after the accident. Claimant argues the Board should apply the offset in a limited nature, with the period of the offset being June 2, 2009 to June 25, 2010, or 54 weeks of the 334.07 weeks of permanent partial disability. This issue was not raised to the Court of Appeals.

Respondent contends that, in addition to the offset to the work disability, the offset should apply to the temporary total disability benefits that were paid after the accident, as claimant was receiving temporary total disability (TTD) at the same time she was receiving social security retirement benefits. Respondent also argues claimant cannot bring up issues that were not brought up on appeal, especially when the Board is tasked only with applying the retirement offset to the award. Respondent also argues claimant is not allowed to supplement the evidentiary record to provide additional facts to support her argument that K.S.A. 44-501(h) does not apply.

FINDINGS OF FACT

Claimant began working for respondent in 2008, working 32 hours per week. She began receiving social security retirement benefits in the amount of \$299.00 per month in November 2008, when claimant reached 62 years of age. On June 2, 2009, claimant suffered a work-related accident when she fell off a stool while working for respondent, stocking shelves. Claimant was paid 4 weeks of temporary total disability compensation as the result of this accident.

As was determined in the Board's Order of January 12, 2012, claimant has suffered a functional impairment of 7.5 percent, a task loss of 87 percent, a wage loss of 100 percent and an ultimate work disability of 93.5 percent. These functional and work disability findings were determined to be appropriate by the Kansas Court of Appeals in its Memorandum Opinion filed March 8, 2013. Claimant's Petition for Review to the Kansas Supreme Court was denied on October 17, 2013. The matter was then remanded to the Board for the calculation of the social security disability offset and its application to claimant's award. The remainder of the Board's Order was affirmed by the Court of Appeals.

Claimant resurrects an earlier argument asking the Board consider whether she had retired prior to the receipt of the social security benefits. Claimant again argues it is respondent's burden to show entitlement for a credit. Finally, claimant argues the offset, if awarded, should be limited to the time claimant continued to work for respondent. Thus, only 54 weeks of PPD benefits would involve the offset.

Respondent contends claimant has no standing to raise her retirement status or to argue respondent's burden of proof at this time. Those issues were determined in respondent's favor by the Court of Appeals and are the law of the case. Respondent also objects to claimant raising the issue of the limited offset at this time as that issue has not been raised before. Even if the Board were to consider this new issue raised by claimant, respondent contends K.S.A. 44-501(h) does not limit the time period when the offset applies to only those times when claimant continued working. Respondent argues the only purpose for this remand to the Board from the final order of the Court of Appeals is to apply the social security retirement offset to the work disability determinations already decided by the Board.

Finally, at oral argument to the Board, claimant raised an issue stemming from a recent Court of Appeals decision in *Hoesli v. Triplett, Inc.*, No. 109,448, a published opinion filed March 7, 2014. The Court in *Hoesli* determined a 2000 change in the federal social security law resulted in the Kansas social security offset no longer applying once a person reaches the age of 65. A Petition for Review to the Kansas Supreme Court was filed in *Hoesli* on April 3, 2014.

PRINCIPLES OF LAW AND ANALYSIS

Supreme Court Rule 8.03i states:

i) The timely filing of a petition for review stays the issuance of the mandate of the Court of Appeals. Pending the determination of the Supreme Court on the petition for review and during the time in which a petition for review may be filed, the opinion of the Court of Appeals is not binding on the parties or on the district courts. An interested person that wishes to cite a Court of Appeals opinion for persuasive authority before the mandate has issued must note in the citation that the case is not final and may be subject to review or rehearing. If petition for review is granted, the decision or opinion of the Court of Appeals has no force or effect, and the mandate will not issue until disposition of the appeal on review. If a petition for review is granted in part, a combined mandate will issue when the appellate review is concluded, unless otherwise specifically directed by the Supreme Court. If review is refused, the decision of the Court of Appeals is final as of the date of the refusal, and the clerk of the appellate courts must issue the mandate of the Court of Appeals.

Regardless of the decision in *Hoesli*, at this time the Board is required to follow the mandate of the Court of Appeals in this matter and apply the social security offset to claimant's award.

K.S.A. 2008 Supp. 44-501(h) states:

(h) If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

The Court of Appeals affirmed the Board's determinations regarding claimant's TTD, functional impairment and work disability. The only action mandated to the Board is the application of the stipulated \$69.00 per week offset against the work disability portion of claimant's award. The calculations of the Board in the original Order of January 12, 2012, apply to this matter, with the exception that the offset must be applied the percentage of work disability earlier determined by the Board and affirmed by the Court of Appeals.

CONCLUSIONS

Pursuant to the mandate of the Kansas Court of Appeals, claimant's award is modified as follows:

Claimant is entitled to 4 weeks of temporary total disability compensation at the rate of \$141.47 per week totaling \$565.88, followed by 31.13 weeks of permanent partial disability compensation at the unreduced rate of \$141.47, totaling \$4,403.96, for a 7.5 percent permanent partial whole person functional impairment, followed by 358.92 weeks of permanent partial whole person general disability at the reduced rate of \$72.47, totaling \$26,010.93, for a total award of \$30,980.77.

As of April 7, 2014, there would be due and owing claimant 4 weeks of temporary total disability compensation at the rate of \$141.47 per week totaling \$565.88, followed by 31.13 weeks of permanent partial disability compensation at the unreduced rate of \$141.47, totaling \$4,403.96, followed by 217.87 weeks of permanent partial general disability compensation at the reduced rate of \$72.47, totaling \$15,789.04, for a total due and owing of \$20,758.88, which is ordered paid in one lump sum, minus any amounts previously paid. Thereafter, claimant is entitled to 141.05 weeks of permanent partial general compensation at the reduced rate of \$72.47, per week totaling \$10,221.89, minus any amounts previously paid, until fully paid or until further order of the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that its January 12, 2012, Order is modified to reflect an offset of claimant's social security retirement benefits pursuant to K.S.A. 44-501(h), as mandated by the Kansas Court of Appeals and as calculated above.

IT IS SO ORDERED.

Dated this _____ day of April, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Jerry Shelor, Special Administrative Law Judge

William G. Belden, Administrative Law Judge